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No. 08-294

IN THE
Supreme Court of the United States

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

PETITIONERS,

v.

MIRIAM FLORES, individually and as parent of Miriam Flores, minor child; ROSA RZESLAWSKI, individually and as parent of Mario Rzeslawski, minor child; STATE OF ARIZONA and the ARIZONA STATE BOARD OF EDUCATION, and its members in their official capacities; THOMAS C. HORNE, Super. of Public Instruction,

RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF ON BEHALF OF THE AMERICAN LEGISLATIVE EXCHANGE COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether a federal-court injunction seeking to compel institutional reform should be modified in the public interest when the original judgment could not have been issued on the state of facts and law that now exist, even if the named defendants support the injunction.

2. Whether compliance with NCLB's extensive requirements for English-language instruction is sufficient to satisfy the EEOA's mandate that States take "appropriate action" to overcome language barriers impeding students' access to equal educational opportunities.

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This institutional reform case, begun more than a decade ago, has embroiled the federal courts in a policy dispute over how Arizona should provide education to English language learners (ELL). It started as a class action by parents and students against Nogales Unified School District for failure to take "appropriate action" to overcome language barriers to students' access to equal education under the Equal Educational Opportunity Act (EEOA). However, through decisions of the District Court and the Ninth Circuit, this case has spun out of control and is now actually interfering with the Arizona legislatures ability to improve ELL education statewide.

The American Legislative Exchange Council (ALEC) is the nation's largest non-partisan individual membership association of state legislators. ALEC has more than 2,000 members in state legislatures across the United States. It serves to advance Jeffersonian principles of free markets, limited government, federalism, and individual liberty. ALEC has a number of interests in this litigation, reflected in its official policies and publications.

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[1] In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel has made a monetary contribution to the preparation or submission of this brief. In accordance with Rule 37.2, amicus states that more than ten days before the due date counsel for amicus provided all parties with notice of its intent to file this brief. All parties consented to the filing of this brief.

ALEC's *Education Principles* state its mission concerning public education: "To promote excellence in the nation's educational system by advocating education reform policies that promote parental choice and school accountability, consistent with Jeffersonian principles of free markets and federalism." ALEC members hold leadership positions in State Senate House chambers, as well as State legislative committees for education, education finance and appropriations. These legislators must fulfill state constitutional obligations to provide for a public education and a determine how federal legal requirements shall be satisfied.

ALEC explicitly supports the No Child Left Behind Act (NCLB). ALEC's *Resolution Supporting the Principles of No Child Left Behind* (2006) reaffirms "that every child be afforded equal opportunity to a quality education regardless of race, creed or background, as recognized in *Brown v. Board of Education* (1954)." It recognizes that "the No Child Left Behind Act fundamentally changes the focus of federal government resources from a system-based focus to a child-based focus," and that "proficiency for all students and closure of the achievement gap, focused on math, science and reading, is fundamentally linked to overall reform of our system of public education through a strong system of accountability and transparency and built on state standards."

REASONS FOR GRANTING THE WRIT

Federal Rule of Civil Procedure 60(b)(5) allows parties to obtain relief from federal district court injunctions and decrees "on such terms as are just" if application of the existing terms of the decree "prospectively is no longer equitable." This Court's decisions endorse a "flexible standard" to modifying injunctions and decrees where factual circumstances and change in the law make district court control of state and local governmental institutions inappropriate. *See Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992); *Frew v. Hawkins*, 540 U.S. 431 (2004). Its decisions also stress the importance of separation of powers, federalism, and democratic accountability.

Unfortunately, the Ninth Circuit Court of Appeals adopted an inflexible approach on review in this matter. It refused to consider whether changed factual circumstances and law brought about by the Arizona Legislature's new public education and finance policies as well as the sweeping NCLB could still justify the injunction today. This Court should grant certiorari to correct the Ninth Circuit's disregard of the "flexible" approach to modifying federal district court decrees and injunctions against state and local governments.

Additionally, the Ninth Circuit's decision improperly empowers federal district courts to assume state legislative appropriation powers. States now face the specter of district courts across the nation ordering them to adopt earmark appropriations or other measures going beyond the express terms of federal law. Unless it is reversed, the Ninth Circuit's ruling will pave the way for

increasingly rigid injunctions and consent decrees to be sought and issued against state and local government institutions based upon novel readings of federal law grounded more in district court policy preference than straightforward readings of federal statutes.

Finally, by furthering an educational policy dispute between the political branches of Arizona, the Ninth Circuit's decision impedes the Arizona Legislature's ability to pursue innovative solutions for improving ELL services—solutions that include good incentives, standards and accountability. This Court's review is especially important in light of the ongoing need of state and local institutions to utilize a variety of policy approaches to ensure proper accountability, standards, and funding for educational and other programs. States must retain flexibility to make appropriations decisions in light of competing interests and increasing federal mandates.[2]

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[2] Although not the focus of this brief, this Court should also grant certiorari to correct the Ninth Circuit's confused reading of federal requirements for ELL education. The Ninth Circuit construed EEOA section 1703(f) and the NCLB's requirements for ELL education as unrelated statutory provisions. It failed to follow common canons of construction that call courts to give harmonious readings to potentially conflicting statutes, and in doing so disregarded the very nature of the landmark NCLB–a comprehensive statute containing specific requirements for ELL education that states must follow. As a result, state legislators tasked with ensuring that federal requirements for ELL education and civil rights are followed now face greater uncertainty about how to meet their obligations. Review by this Court is necessary to clarify the requirements of federal law for ELL education.

I. The Ninth Circuit's Ruling Runs Counter to Important Principles of Federalism, Separation of Powers, and the Democratic Accountability of State and Local Governments.

ALEC's general and principled concerns regarding government institutional reform litigation are embodied in its *Resolution on the Federal Consent Decree Fairness Act* (2006). ALEC affirms that "citizens are entitled to elect state legislators and other leaders to make policy decisions and do the business of governing." ALEC additionally recognizes that "state and local officials often inherit overbroad or outdated consent decrees that limit their ability to respond to the priorities and concerns of their constituents."

As such, ALEC explicitly endorses this Court's assertion in *Frew* that consent decrees may "improperly deprive future officials of their designated legislative and executive powers," leading to "federal court oversight of state programs for long periods of time even absent an ongoing violation of federal law."[3] ALEC's *Resolution* reflects its belief that such decrees should be "narrowly drafted, limited in duration, and respectful of state and local interests and policy judgments." As discussed below, ALEC's position is consistent with this Court's recent decisions regarding institutional reform litigation.

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[3] *Frew*, 540 U.S. at 441.

A. Decisions by this Court Recognize Important Limits on District Court Decrees and Injunctions against State and Local Governments.

Separation of powers and the constitutional value of democratic accountability underlie this Court's institutional reform decisions. This Court recognizes that institutional reform consent decrees and injunctions must be limited in scope and flexibly administered. It has stated that "[i]f not limited to reasonable and necessary implementations of federal law, remedies outlined in consent decrees involving state officeholders may improperly deprive future officials of their designative legislative and executive powers."[4] Moreover, this Court rejected the idea that institutional concerns of state government officials are "only marginally relevant" in the context of consent decrees, instead concluding that "'principles of federalism and simple common sense require the [district] court to give significant weight' to the views of government officials."[5]

This Court's decisions respect the sovereign powers of states and the limited nature of judicial equitable powers in utilizing consent decrees and injunctions to ensure compliance with federal law. Guided by these principles, this Court maintains a "flexible standard" for modifying such consent decrees and injunctions. *See Rufo*, 502 U.S. at 381 ("The experience of the District Courts of Appeals in implementing and modifying such decrees has demonstrated that a flexible approach is often

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[4] *Frew*, 540 U.S. at 441.

[5] *Id.* at 441-442 (quoting *Rufo*, 502 U.S. 367, 392 n.14 (1992)).

essential to achieving the goals of reform litigation"); *Frew*, 540 U.S. at 441 (reiterating that a "'flexible standard' to the modification of consent decrees when a significant chance in facts or law warrants their amendment").[6] The "flexible standard" is supported by public interest reasons because "such decrees 'reach beyond the parties involved directly in the suit and impact on the public's right to the sound and efficient operation of its institutions.'"[7]

ALEC believes a "flexible standard" is the only principled way to balance the need for District Courts to enforce federal law with the need to support the democratic accountability of state and local governments. This "flexible standard" has been aptly described as "consistent with one of the most basic principles of municipal law that holds that neither a government nor its officials may contract away the power to govern."[8] As this Court once declared, "[a]ll agree that the legislature cannot bargain away the police power of a State."[9] Similarly, "a departure from the constitutional plan cannot be ratified by the 'consent' of state officials."[10] A flexible approach to modification of consent decrees better assures that critical decision-making powers of state and local elected officials are not unnecessarily outsourced, but

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[6] (citing *Rufo*, 502 U.S. at 393).

[7] *Rufo*, 502 U.S. at 381, (quoting *Heath v. De Courcy*, 888 F.2d 1105, 1109 (6th Cir. 1989)).

[8] Ross Sandler & David Schoenbrod, *The Supreme Court, Democracy and Institutional Reform Litigation*, 49 N.Y.L.Sch.L.Rev. 915, 923-924 (2005).

[9] *Stone v. State of Mississippi*, 101 U.S. 814, 817 (1879).

[10] *New York v. United States*, 505 U.S. 144, 182 (1992).

remain within the legislative branch. As two legal scholars have pointed out, *Frew* "speaks to this reality by instructing judges and litigants that they are not to forget the values associated with local democracy and flexibility, nor the difficult reality or costs of social change. Judges walk a fine line when affirmatively dictating how government will deliver services."[11]

Democratic accountability of state and local government institutions is especially at risk under consent decrees or injunctions of long duration. As this Court has recognized "[t]he upsurge in institutional reform litigation since *Brown v. Board of Education* ... has made the ability of a district court to modify a decree in response to changed circumstances all the more important. Because such decrees often remain in place for extended periods of time, the likelihood of significant changes occurring during the life of the decree is increased."[12] Preservation of democratic accountability in the face of long-standing consent decrees binding elected officials and their successors underscores the "flexible standard" to modifying such decrees. "[A] state...depends upon successor officials, both elected and appointed, to bring new insights and solutions to problems of allocating revenues and resources."[13] "To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a

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[11] Sandler & Schoenbrod, 49 N.Y.L.Sch.L.Rev. at 929.

[12] *Rufo*, 502 U.S. at 380 (citing 347 U.S. 483 (1954)).

[13] *Frew*, 540 U.S. at 442.

decree that might not have been entered had the matter been litigated to its conclusion."[14]

B. The Ninth Circuit's Inflexible Approach Fails to Consider the Important Constitutional Value of Democratic Accountability That Has Been Emphasized by This Court.

Federal Rule of Civil Procedure 60(b)(5) allows parties to obtain relief from federal district court consent decrees "on such terms as are just" if application of the decree's existing terms "prospectively is no longer equitable." The Ninth Circuit wrongly interpreted this rule to require either "that the basic factual premises of the district court's central incremental funding determination had been swept away," or "some change in the legal landscape that makes the original ruling now improper."[15]

Such an interpretation treats the District Court's injunction and declaratory judgment as ends in themselves rather than as means of ensuring compliance with federal law. Consequently, it undermines democratic accountability, separation of powers, and principles of federalism. Moreover, this interpretation conflicts with the "flexible standard" for consent decree modification previously recognized by this Court and applied by the Fourth, Sixth, Seventh and Eleventh Circuit Courts of Appeal.[16] As

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[14] *Rufo*, 502 U.S. at 392.

[15] Pet. App. 63a.

[16] *See Alexander v. Britt*, 89 F.3d 194, 199-200 (4th Cir. 1996); *Heath v. DeCourcy*, 888 F.2d 1105, 1110 (6th Cir. 1989); *In re Detroit Dealers Ass'n*, 84 F.3d 787, 790 (6th Cir. 1996); *Evans v. City of Chicago*, 10 F.3d 474, 477-479 (7th Cir. 1993); *O'Sullivan v. City of Chicago*, 396 F.3d 843, 862-865 (7th Cir. 2005);

a result, state and local elected officials throughout the nation now face serious uncertainty about whether they can maintain democratic accountability and the ability to exercise their governing powers when under consent decrees. This Court's review of the Ninth Circuit's decision is necessary to vindicate its "flexible standard" to modifying consent decrees and injunctions in institutional reform litigation.

II. The Ninth Circuit's Inflexible Approach Gives Undue Discretion to District Courts to Co-opt the State Legislative Power of Appropriations.

Nowhere is the "flexible standard" for modifying consent decrees and injunctions more important than where, as here, the District Court's exercise of control intrudes on the domain of state legislative appropriations. Under the constitutional separation of powers, appropriations is a legislative function.[17] States also recognized this principle, either through express state constitutional provisions regarding appropriations or through judicial interpretation of

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Reynolds v. McInnes, 338 F.3d 1221, 1226 (11th Cir. 2003); *Ensley Branch, NAACP v. Siebels*, 31 F.3d 1548, 1563-1566 (11th Cir. 2003).

[17] *See* U.S. Const. art I, § 9, cl. 7 ("No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time"); *Bowsher v. Synar*, 478 U.S. 714, 763 (1986) ("appropriating funds is a peculiarly legislative function").

state constitutional provisions concerning legislative power.[18]

ALEC recognizes that there is often an unavoidable tension between legislative appropriations power and a district court's authority to enforce federal law. As this Court's decisions recognize, however, the separation of powers requires that courts addressing institutional reform litigation not ignore the importance of preserving legislative appropriations authority: "Financial constraints may not be used to justify the creation or perpetuation of constitutional violations, but they are a legitimate concern of government defendants in institutional reform litigation and therefore are appropriately considered in tailoring a consent decree modification."[19]

A. Exercise of Appropriations Power Is One of the Primary Responsibilities Undertaken by State Legislatures.

Appropriations decisions are often among the most contentious decisions made in state legislatures. Majority and minority political party caucuses in each chamber wrestle over spending priorities, competing interests are weighed, and compromises are reached through the political process. State Senate and State House bodies duel with one another for weeks – or even months – over spending items, sending budget proposals back and

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[18] *See, e.g.*, discussion and cases cited in *Hunter v. State*, 177 Vt. 339, 346-349, 865 A.2d 381 (Vt. 2004); *State ex rel. Norfolk Beet-Sugar Co. v. Moore*, 50 Neb. 88, 96-102, 69 N.W. 373 (Neb. 1896).

[19] *Rufo*, 502 U.S. at 392-393.

forth. In the final days of state legislative sessions, last-minute spending compromises often require painstaking negotiation.

That appropriations decisions necessarily include such difficulties, complexities, and trade-offs is not surprising given that different and competing government agencies, public programs, and citizen constituencies vie for state funding from a limited state treasury. "Public officials often operate within difficult fiscal constraints; every dollar spent for one purpose is a dollar that cannot be spent for something else."[20] The weighing of different public policies and their related economic and socials costs cannot be carried out according to bright-line formulas. Consideration of innumerable variables is called for in reaching political compromise.

B. Institutional Reform Litigation Can Be Used by Political Factions to Inappropriately Circumvent the Legislature's Appropriations Power.

While entry of district court decrees or injunctions in institutional reform cases might appear at first glance to be separated from the political dimensions attendant to appropriation matters, in reality institutional reform litigation is often seen by rival political interests as merely another battlefield for their political disputes. Defendant state and local governments themselves might have a variety of reasons for entering into consent decrees in the first place. Some state or local officials might enter into a consent decree in hopes of obtaining benefits for an institution or program they

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[20] *Id.* at 396 (O'Connor, J., concurring).

believe would be unlikely to obtain through the legislative process. Others might seek to avoid the financial costs of protracted litigation. Finally, and perhaps most troubling, government defendants might be hoping to prevent negative publicity by abdicating responsibility to federal courts.[21] In this sense, many institutional reform litigation cases – including this case – are used by vying political factions to shift the venue of ongoing public policy disputes from the court of public opinion to a court of law.[22]

ALEC has expressed concerns with a number of institutional reform litigation consent decrees that share common traits with this matter. For example, *Jose P. v. Ambach* was a class action brought under

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[21] Sandler & Schoenbrod, 49 N.Y.L.Rev. at 927:

> Governors and mayors generally share the goals of the litigation; they desire to avoid being labeled as lawbreakers and to be seen instead as problem solvers. They cannot reliably be depended upon to withhold consent from decrees that set out obligations in excess of, or different from, the federal statute, or which imposes details of compliance and milestones that would under other circumstances be left to the managers of the program.

[22] *See* Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limitations on Settlements with the Federal Government*, 40 Stan. L. Rev. 203, 271 (1987):

> officials in different agencies at different levels of authority are engaged in continuous pulling and hauling over resources, priorities, and subtle gradations of policy. A consent decree can be an all too ready handle for officials at one level to manipulate their superiors or rivals.

the Individuals with Disabilities Education Act (IDEA).[23] As a result of this litigation, special education in New York City has been subject to a consent decree since 1979, thwarting efforts by successive mayors and school officials to make reforms and update policies for implementing IDEA. Due to budget constraints, the decree reduced money available for students in non-special education courses, as plaintiffs' attorneys retained control over significant portions of the city's budget. Thus, under the decree, the City Council has been shut out of important policy-making decisions, and outdated policies have been locked into place. ALEC has likewise voiced concern with the decree controlling the Los Angeles County Metropolitan Transit Authority.[24] By decree, the Transit Authority has been required to give busing 47 percent of its budget resources, with all remaining transportation necessities receiving a little over half of the budget.[25] This inflexible budget mandate has severely hampered the Transit Authority's ability to address the evolving transportation needs of Los Angeles and its surrounding counties.

Here, the Ninth Circuit's ruling adds renewed urgency to ALEC's concerns over district court decrees and injunctions that allow certain constituencies to circumvent ordinary legislative

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[23] *See Jose P. v. Ambach*, No. 9 Civ. 270 (E.D.N.Y. Feb. 1979); 20 U.S.C. §§ 1400 et seq.

[24] See *Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, 263 F.3d 1041 (9th Cir. 2001), cert. denied, 535 U.S. 951 (2002).

[25] *Labor/Community Strategy Ctr. v. L.A. County Metro. Transp. Auth.*, No. CV 94-5936 (C.D.Cal. Oct 31, 1996).

processes for balancing competing interests and reaching compromise for use of limited resources.

Such use of institutional reform litigation inappropriately empowers district courts to assume appropriations power, and necessarily undermines the separation of powers. The overly deferential standard of review that the Ninth Circuit applied to the rulings below has allowed the District Court to graft into federal law its own favored appropriations mechanism—and to do so while holding the Arizona legislature hostage with threats of multi-million dollar daily fines.

C. The Ninth Circuit's Decision Risks Subjecting State Legislatures to an Increasing Number of District Court Injunctions Requiring Earmarks.

The Ninth Circuit's decision has nationwide implications. By giving federal district courts broad latitude to impose particular mechanisms for appropriations based on novel federal legal requirements, the Ninth Circuit has empowered its district courts to enter ongoing public policy battles by controlling funding of state and local institutions and programs. State and local governments now face greater likelihood that institutional reform plaintiffs will seek earmark appropriations by judicial order.

This specter of earmark appropriations through federal district court consent decrees and injunctions threatens difficulties for states in a multitude of areas. For example, in the health care arena, states increasingly take on greater obligations to their

citizens through Medicaid programs.[26] It is projected that states will face serious budgetary difficulties in meeting these obligations.[27] Medicaid comes with significant federal requirements that states must meet to obtain matching grants,[28] and state compliance with these federal requirements has already been the subject of significant institutional reform litigation.[29] For example, ALEC has expressed misgivings with a district court's oversight of Tennessee's Medicaid program.[30] 2004 reforms approved by Tennessee's governor and the state

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[26] National Governors Association and National Association of State Budget Officers, *The Fiscal Survey of States* 5, (June, 2008) ("Medicaid spending is approximately 22 percent of total state spending and is the single larges portion of total state spending. ... state officials are becoming increasingly worried that covering the long term costs of health care programs will become very difficult with each passing year"), available at http://www.nasbo.org/Publications/PDFs/Fiscal%20Survey%20of%20the%20States%20June%202008.pdf.

[27] Government Accountability Office, *State and Local Governments: Growing Fiscal Challenges Will Emerge during the Next 10 Years* 1 (Washington, DC: GAO, January, 2008) ("in the absence of policy changes, large and recurring fiscal challenges for the states and local sector will begin to emerge within a decade" and observing that "the growth in the health-related costs serves as the primary driver of the fiscal challenges facing the state and local government sector") available at www.gao.gov/new.items/d08317.pdf.

[28] *See, e.g, Frew*, 540 U.S. at 433 ("State participation [in Medicaid] is voluntary; but once a State elects to join the program, it must administer a state plan that meets federal requirements").

[29] *See, e.g, id.* at 431.

[30] *See Grier v. Goetz*, 402 F.Sup.2d 871 (M.D.Tenn. 2005), amended by, motion denied by Grier v. Goetz, 2006 U.S. Dist. LEXIS 11211 (M.D.Tenn., Mar. 15, 2006).

legislature were blocked because of consent decrees dating to 1979. Only some of the reforms were initially allowed to go forward.[31] This resulted in increased costs for taxpayers and loss of coverage for many enrollees.

The Ninth Circuit's inflexible approach to the modification of federal district court consent decrees and injunctions could dramatically impact this type of litigation. Allowing district courts to impose earmarked spending obligations relating to state Medicaid funding could trigger a new wave of institutional reform litigation that could dramatically undermine state legislative appropriations power.

Separation of powers concerns posed by federal district court assumption of state legislative appropriations powers compels this Court's granting of certiorari. The Ninth Circuit's inflexible approach empowers district courts to elevate discretionary policy choices involving legislative appropriations into specific federal requirements. States now face the likelihood of increasing institutional reform litigation seeking earmarked spending injunctions for health care and other areas. This Court's vindication of the flexible standard to consent decree administration is crucial to correcting the Ninth Circuit's backslide.

III. The Ninth Circuit's Decision Improperly Usurps State Legislatures' Responsibility to Determine the Most Effect Methods to Improve Student Performance.

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[31] The Sixth Circuit, however, reversed two of the district court's orders. *See Rosen v. Goetz*, 410 F.3d 919 (6th Cir. 2005); *Rosen v. Goetz*, 129 Fed. Appx. 167 (April, 12, 2005).

The policy considerations and legal implications discussed above come into even sharper focus in the context of public education and ELL services. This Court's jurisprudence recognizes that public education is a primary responsibility of states.[32] It likewise recognizes that public education finance is a significant function of state and local governments.[33] Fulfilling these duties involves myriad complexities, competing policy choices, and trade-offs. Parents trust state and local governments to provide education in a manner that respects their right to direct the upbringing of their children.[34] Taxpayers trust state and local governments to finance public education through wise policymaking and administration. States must routinely balance the competing interests of local control by school districts with performance-driven accountability standards.[35]

Complicating these issues further is the fact that the most effective methods for achieving

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[32] *See, e.g., Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

[33] *See, e.g., San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 58 (1973)("The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States").

[34] *See, e.g., Troxel v. Granville*, 530 U.S. 57, 66 (2000).

[35] *Board of Ed. of Oklahoma City Public Schools v. Dowell*, 498 U.S. 237, 248 (1991)("[l]ocal control over the education of children allows citizens to participate in decisionmaking, and allows innovation so that school programs can fit that need"); *Claremont Sch. Dist. v. Governor*, 147 N.H. 499, 508-509 (N.H. 2002) (concluding accountability standards are an essential component of the State's constitutional duty to provide adequate education and discussing similar decisions in other states).

improved educational performance is a matter of ongoing debate. Here the District Court posited that increased educational spending correlates with ELL educational success—supposedly fulfilling the requirements of EEOA § 1703(f). By implication, more balanced policy approaches – such as those that include performance standards and financial accountability – are unsatisfactory. But the correlation between increased spending and improved performance is questionable at best. Indeed, ALEC believes that rigorous performance standards and financial accountability mechanisms are crucial to improving public education, and increases in educational spending without standards and accountability will most likely be ineffective.

A. Increased Spending by Itself Is Insufficient to Ensure Effective ELL Educational Performance.

This Court has recognized that "one of the major sources of controversy concerns the extent to which there is a demonstrable correlation between educational expenditures and the quality of education."[36] Policy debate over the effectiveness of spending increases on overall educational performance continues today. For instance, ALEC's recent study of educational spending increases and student achievement test results questioned the effectiveness of spending increases alone in improving performance:

> The first conclusion of these [statistical] tests is that differences in educational inputs measured in this study (students

[36] *Rodriguez*, 411 U.S. at 42-43.

> per school, schools per district, student-to-teacher ratios, per pupil expenditures, teacher salaries, and funds received from the federal government) taken together do not explain differences in school achievement. ...
>
> The second general conclusion of these [statistical] tests is that very few of the educational inputs measured in this study, taken individually and holding all others constant, have an impact on student performance levels. Specifically, the number of schools per district, the level of per pupil expenditures and teacher salaries have no impact on student achievement. ...
>
> The natural conclusion of these statistical tests ... is that factors other than those measured in this study are the key determinants of high levels of academic achievement.[37]

Another study suggests factors such as financial accountability and academic standards – as opposed to merely increasing absolute spending – have profound effects on educational performance:

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[37] Andrew T. LeFevre, *Report Card on American Education: A State-by-State Analysis, 1985-1986 to 2006-2007* 111, American Legislative Exchange Council (Matt Warner, ed.) (February, 2008), available at: http://www.alec.org/am/pdf/2007_ALEC_Education_Report_Card.pdf.

> **Return on investment varies greatly across states.** States like Utah and North Carolina appear to spend their education dollars far more efficiently than many of their peers, posting twice the rate of return on their education investments. Other states show disappointing academic results given their spending levels, even after accounting for student poverty, cost of living, and the number of pupils with special needs.
>
> ...
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> **State standards are often too inadequate.** Many states have done a mediocre job of establishing rigorous standards in key subject areas. Without clearer, rigorous guidelines about what students need to know, states will have a hard time measuring achievement and holding students and schools accountable for performance.[38]

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[38] U.S. Chamber of Commerce, *Leaders and Laggards: A State-by-State Report Card on Educational Effectiveness* 7 (February, 2007), available at: http://www.uschamber.com/NR/rdonlyres/e6vj565iidmycznvk4ikm3mryxo5nslm7iq2uyrta5vrqdxsagjvkxafz6r3buzaopo4uxv4o4ep4nvhmc3ppc7drjd/USChamberLeadersandLaggards.pdf. *See also* Dan Lips, Shanea J. Watkins, and John Fleming, *Does Spending More on Education Improve Academic Achievement?* 6, The Heritage Foundation (September 8, 2008), available at http://www.heritage.org/Research/Education/bg21789.cfm ("Long-term measures of American students' academic achievement ... show that the performance of American students has not improved dramatically in recent decades, despite substantial spending increases").

Additionally, scholarly debate exists over the effectiveness of mandating educational spending increases through litigation in the first instance.[39] Recent scholarship suggests that while court mandates for education spending have had significant short-term results, the long-term impact has not been particularly positive.[40] Despite state court-ordered spending increases on education, long-term spending in those states frequently appears lower than what would have been expected based on pre-litigation spending growth trends.[41] As one scholar concluded:

> Particularly in states where courts forced lawmakers to increase recurring expenditures, the evidence suggests that appropriation by litigation is not a particularly efficient means of securing

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[39] *See* Frederick Hess, "Adequacy Judgments and School Reform," in School Money Trials (Martin West, ed.) 185 (Brookings Institution Press 2007) ("successful adequacy efforts modestly boosted total spending but had no discernable effect on teacher pay or class size").

[40] *See, e.g.*, Matthew G. Springer and James W. Guthrie, *Adequacy's Politicization of the School Finance Legal Process*, *in* School Money Trials (West, ed.) at 121 ("Legislative and executive branch deliberations are better adapted to accommodating uncertainty, deconstructing complexity and considering trade-offs since their operational arrangements permit a far wider opportunity for constructive criticism and successive approximation to take place").

[41] *See* Chris Atkins, *Appropriation by Litigation: Estimating the Cost of Judicial Mandates for State and Local Education Spending*, Tax Foundation (July 2007), available at http://www.taxfoundation.org/files/bp55.pdf.

> permanent funding increases for schools.[42]
>
> ...
>
> Those who pursue education appropriation through litigation have succeeded in using the courts to secure increased funding commitments of over $34 billion, or $976 per pupil, from state lawmakers in 27 states. In the long run, however, overall spending trends in these states suggest that recurring spending is stagnant after court mandates, while capital spending is permanently higher.[43]

Finally, it is not only scholars and advocacy groups that recognize deficiencies in relying solely on increased spending to increase ELL effectiveness. Indeed it was a bipartisan recognition that stricter accountability and standards were needed that led to Congress enacting NCLB in 2002. Title III of NCLB specifically addresses the issues of ELL. Moving beyond the "appropriate action" required under the EEOA, Congress required states and school districts to implement new programs, develop quantifiable performance benchmarks, and annually report progress.[44]

B. The Ninth Circuit's Decision Actually Deprives State and Local Governments of the Ability to Most

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[42] *Id.* at 3

[43] *Id.* at 15.

[44] *See* 20 U.S.C. §§ 6301, *et seq.*

Effectively Meet Federal ELL Standards.

If nothing else, the above discussion demonstrates that there are no bright-line solutions to the challenges facing schools endeavoring to improve educational performance. For this reason, ALEC believes it is vital that state and local governments fulfill their responsibilities within the context of democratic accountability and separation of powers. Thus, while it is undisputed that federal district courts may ensure that public education meets the requirements of federal law, it is state and local governments that are best equipped to determine the means by which that end is met. Put another way, district courts must remain focused on whether public education is in compliance with the standards of federal law, not take sides in contested educational policy debates over the most effective methods for obtaining such compliance. Under the Ninth Circuit's decision, district courts can usurp the role of state and local governments in order to promote disputed policy viewpoints under the guise of enforcing federal law. This approach undermines (indeed nearly obliterates) democratic accountability and separation of powers.

The negative impact of such a role-reversal is highlighted by the Ninth Circuit's decision here. While the original finding of a violation of the EEOA and subsequent consent decree purported to ensure that Arizona schools meet federal requirements for ELL, in reality it has likely had the opposite effect. The goal of achieving equal access to educational opportunities for ELL students has been replaced by a policy decision that specific earmark funding for ELL programs is the only way to comply with the

EEOA—notwithstanding that the requirements imposed by the District Court clearly exceed the terms of the EEOA and NCLB. Remarkably, this policy decision has been endorsed by both the Ninth Circuit and the District Court despite their recognition that Arizona has "substantially complied" with the purpose of the original injunction. In other words, the Ninth Circuit and District Court have unnecessarily placed means above ends in purporting to ensure compliance with federal law.

This encroachment on the state legislature's responsibilities and powers has only been exacerbated by the Ninth Circuit's inflexible approach to the modification of the injunction. The Ninth Circuit failed to consider whether an injunction could even be obtained under current factual circumstances or under current law. Pet. App. 63a. In particular, it refused to consider changed factual circumstances owing to the Arizona Legislature's newly-adopted accountability standards and increased spending for education under HB 2064, and similarly refused to consider changed federal legal requirements under NCLB. *Id.* In so doing, the Ninth Circuit disregarded this Court's guidance with regards to employing a "flexible standard" for the modification of institutional reform consent decrees and injunctions, and instead improperly allowed the District Court to choose a particular public policy for addressing a core state function.

Review by this Court is necessary to reassert the inherent limits of federal district courts' equitable powers. In *Rufo*, this Court observed that "the public interest and '[c]onsiderations based on the allocation of powers within our federal system,' ...require that

the district court defer to local government administrators, who have the 'primary responsibility for elucidating, assessing, and solving' the problems of institutional reform, to resolve the intricacies of implementing a decree modification."[45] The Ninth Circuit's inflexible approach enables district courts to disregard principles of federalism by failing to defer to states' discretionary authority in providing public education. As a result, the Arizona legislature has been deprived of the most effective methods of satisfying federal requirements – namely through implementing policies emphasizing performance standards and financial accountability.

CONCLUSION

This case has nationwide ramifications for federalism and separation of powers. The Ninth Circuit's departure from this Court's "flexible standard" to modifying consent decrees and injunctions, and its refusal to accord state elected officials deference in making complex public policy choices, opens the door to judicial micromanagement of innumerable state and local government institutions. This Court's review is especially important given the impact of the Ninth Circuit's ruling in the realm of public education. ALEC firmly believes that standards and accountability are crucial to public educational success. But the ability of legislators to take state and local dynamics into account while setting educational policy is undermined by inflexible district court decrees and injunctions unreflective of changes in factual circumstances or law. The ability of states to adopt

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[45] 502 U.S. at 392 (quoting *Dowell*, 498 U.S. at 248 and *Brown*, 349 U.S. at 299).

innovative new approaches to providing education is diminished when district courts micromanage educational policy. As such, ALEC respectfully requests that the petition for writ of certiorari be granted.

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